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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Joseph Martin McGhee,

10 Plaintiff,

11 v.

12 City of Flagstaff, et al.,

13 Defendants.  
14

No. CV-20-08081-PCT-GMS

**ORDER**

15 Before the Court are (1) Plaintiff Joseph McGhee (“Plaintiff”)’s Motion for Leave  
16 to File Excess Pages for Motion for Temporary Restraining Order and Preliminary  
17 Injunction, (Doc. 23); (2) Plaintiff’s Motion for Leave to File Excess Pages for  
18 Memorandum of Law in Support of Third Amended Complaint, (Doc. 24); and (3)  
19 Plaintiff’s Amended Emergency Motion for Temporary Restraining Order and Preliminary  
20 Injunction, (Doc. 22).

21 Good cause appearing, Plaintiff’s dual Motions for Leave to File Excess Pages are  
22 granted. The Court held a hearing on Friday, May 8, 2020 regarding Plaintiff’s Emergency  
23 Motion for Temporary Restraining Order and Preliminary Injunction. After considering the  
24 parties’ arguments and briefing, Plaintiff’s Motion is denied.

25 **BACKGROUND**

26 Arizonans, like all Americans and much of the world, are now familiar with the  
27 Coronavirus (“COVID-19”) pandemic.<sup>1</sup> The seriousness of the COVID-19 outbreak came  
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<sup>1</sup> See the Court’s Order, Doc. 41, for facts the Court has taken judicial notice of in this

1 to the attention of many on January 30, 2020 when the United Nations World Health  
2 Organization (“WHO”) declared the effects of the outbreak a public health emergency. The  
3 next day the United States Department of Health and Human Services (“HHS”) declared  
4 the same. The outbreak was officially classified as a pandemic by the WHO on March 11,  
5 2020. Later that same day, Governor Ducey issued a Declaration of Emergency in Arizona  
6 citing the WHO and HHS declaration. Just days later, President Trump declared a national  
7 emergency and Plaintiff’s Mayor, Defendant Carol Evans, declared a state of local  
8 emergency in Flagstaff, Arizona.

9 According to the Center for Disease Control (“CDC”), the virus is primarily spread  
10 from person to person such that a person can become infected by coming into close contact  
11 (within 6 feet) with a person who has COVID-19. The CDC has also reported that a person  
12 may be infected with COVID-19 but not show any symptoms. Because there is not yet a  
13 vaccine, the only known method to slow the spread of the virus is to maintain physical  
14 distance from others. Accordingly, the CDC and President Trump issued guidance  
15 recommending that individuals avoid social gatherings of more than 10 people.

16 In an attempt to mitigate the spread of COVID-19, Governor Ducey and Mayor  
17 Evans issued various executive orders and proclamations. Mayor Evans issued a  
18 proclamation on March 15, 2020 mandating that all Flagstaff restaurants, bars, theaters,  
19 gyms, and other like businesses close to the public.<sup>2</sup> The proclamation, however,  
20 encouraged restaurants to offer curb-side or delivery services and exempted several  
21 businesses such as grocery stores, pharmacies, and food banks from the directive. Shortly  
22 thereafter, Governor Ducey issued Executive Order 2020-09, which similarly mandated  
23 that “all restaurants in counties of the State with confirmed cases of COVID-19 shall close  
24 access to on-site dining until further notice. Restaurants may continue serving the public  
25 through pick up, delivery, and drive-thru operations.” (Doc. 21-16 at 2.) On March 30,

26  
27 action.

28 <sup>2</sup> This proclamation was later amended to include salons among the list of businesses that must close to the public and extended the time in which the proclamation would be in effect.

1 2020, Governor Ducey issued Executive Order 2020-18 (“EO 2020-18”), which  
2 implemented a “Stay Home, Stay Healthy, Stay Connected” policy under which “all  
3 individuals in the State of Arizona shall limit their time away from their place of residence  
4 or property.” (Doc 21-18 at 1.) This directive, however, is subject to various exceptions,  
5 such as: “caring for a family member, friend or pet in another household”; “engaging in  
6 outdoor exercise activities . . . if appropriate physical distancing practices are used . . .”;  
7 “attending or conducting work” and “engaging in constitutionally protected activities such  
8 as speech and religion . . . provided that such is conducted in manner that provides  
9 appropriate physical distancing to the extent possible.” (Doc. 21-18 at 3.) Notably, “[n]o  
10 person shall be required to provide documentation or proof of their activities to justify their  
11 activities under this order.” (*Id.* at 2.) EO 2020-18 was made effective through April 30,  
12 2020.

13 On April 29, 2020, Governor Ducey issued Executive Order 2020-33 (“EO 2020-  
14 33”) which amended the “Stay Home, Stay Healthy, Stay Connected” order to be in effect  
15 until May 15, 2020. EO 2020-33 maintained the same exceptions provided in EO 2020-18  
16 and expanded Arizonans’ ability to visit retail businesses. (*See generally* Doc 21-19.) On  
17 May 4, 2020, Governor Ducey issued Executive Order 2020-34 modifying EO 2020-09  
18 and permitting restaurants to resume dine-in services under certain conditions. (Doc. 27 at  
19 9.)

20 Plaintiff, a former restaurant employee from Flagstaff, Arizona, brings this action  
21 challenging the validity of various state and local government actions taken in response to  
22 COVID-19. Specifically, Plaintiff argues that EO 2020-09, EO 2020-18, EO 2020-33, and  
23 Mayor Evans’ Proclamations violate his procedural and substantive due process rights and  
24 were not permitted by relevant Arizona statutes. On April 27, 2020 Plaintiff filed an *Ex*  
25 *Parte* Emergency Motion for Temporary Restraining Order Without Notice and  
26 Preliminary Injunction seeking to enjoin the enforcement of EO 2020-09 and EO 2020-18.  
27 (Doc. 15.) The Court directed Defendants Ducey and Evans to file notices indicating if  
28 they received service of Plaintiff’s Motion. (Doc. 17.) Upon receipt of such notice, the

1 Court issued an expedited briefing schedule giving Defendants an opportunity to respond  
 2 to Plaintiff's Emergency Motion for Temporary Restraining Order Without Notice and  
 3 Preliminary Injunction and giving Plaintiff an opportunity to reply. (Doc. 20.) On the same  
 4 day the briefing schedule was issued, Plaintiff filed an "Amended Complaint Three,"  
 5 ("TAC") (Doc. 21), and an "Amended Ex Parte Emergency Motion for Temporary  
 6 Restraining Order and Preliminary Injunction," ("Amended Motion") (Doc. 22). The  
 7 Amended Motion seeks to enjoin enforcement only of EO 2020-33 and the issuance of any  
 8 subsequent executive order. Governor Ducey's response, in which Mayor Evans joins,  
 9 addresses the Amended Motion and TAC.

# 10 **I. Preliminary Injunction**

11 Plaintiff requests a preliminary injunction enjoining enforcement of Governor  
 12 Ducey's Executive Order #2020-33 ("EO 2020-33") and enjoining Governor Ducey from  
 13 "issuing any future Executive Order which is a quarantine or a per se quarantine excepting  
 14 under the conditions as set forth under A.R.S. §§ 36-787, 36-788, and 36-789." (Doc. 22-  
 15 1 at 21.) "A plaintiff seeking a preliminary injunction must establish that he is likely to  
 16 succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
 17 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in  
 18 the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A  
 19 preliminary injunction may also be appropriate if a movant raises 'serious questions going  
 20 to the merits' and the 'balance of hardships . . . tips sharply towards' it, as long as the  
 21 second and third *Winter* factors are satisfied." *Disney Enterprises, Inc. v. VidAngel, Inc.*,  
 22 869 F.3d 848, 856 (9th Cir. 2017).

## 23 **A. Likelihood of Success on the Merits**

24 In support of his request for a preliminary injunction, Plaintiff claims EO 2020-33  
 25 violates his procedural and substantive due process rights and Arizona statutes concerning  
 26 quarantine procedure. Plaintiff also argues that Ducey's declaration of a state of emergency  
 27 was not supported by Arizona law. Plaintiff must show that he is likely to succeed on these  
 28 claims or at least raise serious questions going to their merits to proceed in the preliminary

1 injunction analysis. For the following reasons, the Court finds Plaintiff has not met this  
2 burden.

3 **1. Governor Ducey did not violate Arizona’s quarantine procedure.**

4 Plaintiff contends that EO 2020-33 places him under quarantine and thus could not  
5 be issued without following the procedures set forth in Arizona’s quarantine statutes,  
6 A.R.S. §§ 36-788, 36-789. EO 2020-33, however, does not place Plaintiff or anyone else  
7 under “quarantine.” Under A.R.S. § 36-788, a person in quarantine is strictly prohibited  
8 from leaving the quarantine premises and, except for very narrow exceptions, cannot  
9 receive visitors. A.R.S. § 36-788(D), (E). Even by Plaintiff’s own definition, “a  
10 quarantined individual is not free to engage in daily activities or to leave a place, perhaps  
11 except under a narrow set of circumstances.” (Doc 22-1 at 8.) As outlined in EO 2020-33  
12 and discussed throughout this order, EO 2020-33 does not prevent any person from  
13 engaging in activities, leaving their homes, or visiting friends or family. Because EO 2020-  
14 33 does not impose a quarantine as defined under the applicable statutes, the statutes do not  
15 apply. Thus, Plaintiff has not raised serious questions as to the merits of this claim, let  
16 alone established he is likely to succeed.

17 **2. Governor Ducey’s declaration of a state of emergency did not**  
18 **violate A.R.S. § 26-303.**

19 It is not disputed that EO 2020-33 was issued pursuant to A.R.S. § 26-303(E), which  
20 bestows the governor, after a state of emergency is declared, with “the right to exercise . .  
21 . all police power vested in the state by the constitution and laws of this state.” Plaintiff,  
22 therefore, challenges the validity of EO 2020-33 by asserting that Governor Ducey had no  
23 authority to declare a state of emergency under A.R.S. § 26-303.

24 Under Arizona law, the governor may declare a state of emergency if there is “the  
25 duly proclaimed existence of conditions of disaster or of extreme peril to the safety of  
26 persons or property within the state caused by air pollution, fire, flood or floodwater, storm,  
27 epidemic, riot, earthquake or other causes.” A.R.S. § 26-303(D); A.R.S. § 26-301(15).  
28 Because the term “extreme peril” is not defined in the statute, Plaintiff offers Merriam-  
Webster Dictionary definitions of the two words and contends that it means “exposure to

1 the risk of death destruction or loss, existing in a very high degree.” (Doc. 22-1 at 17.)  
 2 Applying this definition, Plaintiff claims that under one possible version of still-developing  
 3 facts “an infectious disease, where the overwhelming majority of those who are infected –  
 4 by some estimates more than 99.88% in one-hundred – will recover without any medical  
 5 intervention, cannot reasonably be characterized as a condition of ‘extreme peril.’” *Id.* at  
 6 18.

7 However, A.R.S. § 26-303(D) gives the governor the authority “to find” the  
 8 requisite circumstances exist. The Supreme Court has “disclaimed any judicial power to  
 9 second-guess the state’s policy choices in crafting emergency public health measures.” *In*  
 10 *re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (citing *Jacobson v. Massachusetts*, 197 U.S.  
 11 11, 28 (1905)). The *Jacobson* court reasoned, “Smallpox being prevalent and increasing at  
 12 Cambridge, the court would usurp the functions of another branch of government if it  
 13 adjudged, as matter of law, that the mode adopted under the sanction of the state[, a  
 14 mandatory vaccine], to protect the people at large was arbitrary, and not justified by the  
 15 necessities of the case.” *Jacobson*, 197 U.S. at 28. The circumstances before the Court are  
 16 no different. COVID-19 was present and rising in Arizona, and had been identified as a  
 17 public health emergency by both the WHO and HHS. the Court simply does not possess  
 18 the authority to second-guess Governor Ducey’s decision to declare a state of emergency,  
 19 in accordance with Arizona law, where there was some evidence, upon which he relied<sup>3</sup>,  
 20 to support the existence of a public health emergency.

21 Of course the governor’s power “to declare an emergency and thus eliminate the  
 22 constraints of the due process clause is not without bounds.” *Sinaloa Lake Owners Ass’n v.*  
 23 *Tudor*, 882 F.2d 1398, 1406 (9th Cir.1989), overruled on other grounds by *Armendariz v.*  
 24 *Penman*, 75 F.3d 1311, 1324 (9th Cir.1996). However, to evade the deferential review  
 25 given to emergency decisions, a plaintiff must show “the [state] official[] kn[e]w no  
 26 emergency exist[ed], or [acted] with reckless disregard of the actual circumstances.” *Id.* In

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27  
 28 <sup>3</sup> Governor Ducey’s Declaration of Emergency regarding COVID-19 cites the WHO and  
 HHS declarations of public health emergencies and the WHO’s official declaration of a  
 pandemic due to COVID-19. (Doc. 21-13 at 1.)

1 light of the multiple publications declaring COVID-19 a public health emergency, and  
 2 Plaintiff's own admission that COVID-19 is highly contagious and present in all 50 states,  
 3 Plaintiff has not and is not likely able to make this showing. As a result, Plaintiff will not  
 4 likely succeed on the merits of this claim. Nor does the Court find that Plaintiff has raised  
 5 serious questions as to its merits.

6 **3. EO 2020-33 did not violate Plaintiff's procedural due process**  
 7 **rights.**

8 The Fourteenth Amendment to the United States Constitution prohibits the  
 9 deprivation of "life, liberty, or property without due process of law." U.S. Const. amend.  
 10 XIV § 1. Thus, "[a] procedural due process claim has two distinct elements: (1) a  
 11 deprivation of a constitutionally protected liberty or property interest, and (2) a denial of  
 12 adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*,  
 13 149 F.3d 971, 982 (9th Cir. 1998). Plaintiff asserts that EO 2020-33 deprives him of his  
 14 fundamental rights to travel<sup>4</sup> and movement without notice or a hearing as required by due  
 15 process. *See Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the  
 16 'liberty' of which the citizen cannot be deprived without the due process of law under the  
 17 Fifth Amendment . . ."); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir.  
 18 1997) ("Citizens have a fundamental right of free movement."); *see also Zinermon v.*  
 19 *Burch*, 494 U.S. 113, 127 (1990) (noting that due process generally requires some kind of  
 20 notice or hearing before a state may deprive a person of liberty) (citing *Goss v. Lopez*, 419  
 21 U.S. 565, 579 (1975)).

22 Plaintiff's only claim that EO 2020-33 infringes his right to travel and movement is  
 23 that it prohibits an individual from "wander[ing] about without any specific purpose."  
 24 (Doc. 36 at 8.) As an initial matter, EO 2020-33 does not prohibit any person from leaving  
 25 their home. EO 2020-33 explicitly exempts, among other things, "constitutionally  
 26 protected activities" and "outdoor exercise activities, such as walking" from its coverage.  
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28 <sup>4</sup> Plaintiff does not assert that EO 2020-33 restricts his right to interstate travel but focuses  
 his objection on his alleged inability to wander about without any specific purpose.

(Doc. 21-19 at 4.) Moreover, EO 2020-33 explicitly states that persons will not be required to provide proof to justify their activities. (Doc 21-19 at 3.) Thus, contrary to Plaintiff's assertion, he or anyone else, may, in many circumstances, leave their home and wander about, in compliance with physical distancing guidelines, without risk of violating the order.

However, to the extent there are some exercises of Plaintiff's right to movement that are curtailed by EO 2020-33, A.R.S. 26-303(E)<sup>5</sup> gives Governor Ducey the authority to impose such restrictions. As established above, during a state of emergency A.R.S. § 26-303(E) gives the governor "the right to exercise . . . all police power vested in the state by the constitution and laws of this state." The police power undeniably includes the authority to effectuate rules to protect public health and safety. *See Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion . . . that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."). While Plaintiff disputes the seriousness of the COVID-19 pandemic, he cannot seriously dispute that agencies across the world and within the United States have declared that COVID-19 presents a public health emergency. Nor does Plaintiff dispute that C[OVID]-19 is highly contagious. (Doc. 36 at 5.) The CDC has issued guidance that COVID-19 is known to spread through close contact with infected persons and that not all infected persons are symptomatic. Thus, the precise aimless wandering Plaintiff claims EO 2020-33 prohibits is the exact type of activity that could cause the virus to spread. Accordingly, it cannot reasonably be said that EO 2020-33 was not issued in accordance with the emergency police power vested in Arizona's Governor by the Arizona Legislature. Moreover, the Supreme Court has affirmed "that summary governmental action taken in emergencies and designed to protect the public health, safety and general welfare does not violate due process." *Lumbreras v. Roberts*, 319 F. Supp. 2d

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<sup>5</sup> Plaintiff, for the first time in his Reply, seems to raise an argument that EO 2020-33 is overbroad. However, because the argument was improperly raised, the Court need consider this argument in ruling on the motion. *See Delgadillo v. Woodford*, 527 F.3d 919, 930 n. 4 (9th Cir. 2008) ("Arguments raised for the first time in [the] reply brief are deemed waived.")

1 1191, 1206 (D. Or. 2004) (quoting *Sinaloa*, 882 F.2d at 1406). Consequently, Plaintiff is  
 2 not likely able to succeed in establishing that he was deprived of his rights without due  
 3 process, nor does the Court find Plaintiff raised serious questions on the matter. As a result,  
 4 Plaintiff has not established a likelihood that he will succeed on the merits of this claim,  
 5 nor has he raised serious questions on the matter.

6 **4. EO 2020-33 does not violate Plaintiff's substantive due process**  
 7 **rights.**

8 "The Fourteenth Amendment's Due Process Clause protects individuals from state  
 9 action that either shocks the conscience or interferes with rights implicit in the concept of  
 10 ordered liberty." *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (internal  
 11 citations omitted). Plaintiff again asserts that EO 2020-33 "is a manifest infringement upon  
 12 a fundamental liberty guaranteed under the Constitution of the United States"—the right  
 13 to free movement and travel. (Doc. 21-1 at 14.) However, Plaintiff's substantive due  
 14 process claim fails for substantially the same reasons as his procedural due process claim.

15 Assuming Plaintiff can establish EO 2020-33 infringes on a fundamental right, the  
 16 Supreme Court's *Jacobson* framework for evaluating state actions in the context of a public  
 17 health emergency governs the substantive due process analysis. *See Abbott*, 954 F.3d at  
 18 777–78) (applying *Jacobson* framework to constitutional challenge to executive order by  
 19 Texas Governor relating to COVID-19); *see also Martinko v. Whitmer*, No. 20-00062-MM,  
 20 at 11 (Mich. Ct. Cl. Apr. 29, 2020) (applying *Jacobson* test to substantive due process  
 21 claims against Michigan stay-at-home order). In *Jacobson*, the Supreme Court upheld a  
 22 state law mandating smallpox vaccinations. *Jacobson v. Massachusetts*, 197 U.S. 11, 31  
 23 (1905). The Supreme Court explained that "the liberty secured by the Constitution of the  
 24 United States to every person within its jurisdiction does not import an absolute right in  
 25 each person to be, at all times and in all circumstances, wholly freed from restraint. . . This  
 26 court has more than once recognized it as a fundamental principle that persons and property  
 27 are subjected to all kinds of restraints and burdens in order to secure the general comfort,  
 28 health, and prosperity of the state." *Id.* at 26. The Fifth Circuit, applying *Jacobson*,

1 summarized that “[t]he bottom line is this: when faced with a society-threatening epidemic,  
2 a state may implement emergency measures that curtail constitutional rights so long as the  
3 measures have at least some ‘real or substantial relation’ to the public health crisis and are  
4 not ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental  
5 law.’” *Abbott* 954 F.3d at 784 (quoting *Jacobson*, 197 U.S. at 31).

6 As discussed above, EO 2020-33 has at least some “real or substantial relation” to  
7 the public health crisis resulting from COVID-19; and just as Plaintiff cannot show EO  
8 2020-33 is arbitrary, he cannot show it is beyond all question, a plain, palpable invasion of  
9 his fundamental rights. EO 2020-33 incorporates various exceptions to its directive that  
10 Arizonans limit their time away from home. Those exception include engaging in  
11 constitutionally protected activities, outdoor exercise, caring for family members or friends  
12 in other residences, attending work or volunteering in essential functions, visiting retailers,  
13 and other “essential activities.” (Doc. 21-19 at 3-4.) To the extent Plaintiff wishes to move  
14 outside his home, EO 2020-33 does not preclude him from doing so. It merely demands he  
15 do so “at least six feet from any other person” “*to the extent possible*.” (Doc. 21-19 at 4)  
16 (emphasis added). Consequently, even to the extent Plaintiff disputes the *Jacobson*  
17 framework applies, he has not and is unlikely to show that EO 2020-33 “shocks the  
18 conscience.” *Lumbreras*, 319 F. Supp. 2d at 1212 (explaining that to show a measure is  
19 “conscience shocking” a plaintiff must show, at the very least, that “the government’s  
20 action was ‘clearly arbitrary and unreasonable, having no substantial relation to the public  
21 health, safety, morals, or general welfare.’”) (quoting *Sinaloa Lake*, 882 F.2d at 1407).

22 In light of the circumstances presented by COVID-19 and the fundamental principle  
23 that our individual rights must at times yield to the needs of society, Plaintiff has not  
24 demonstrated that he will likely succeed on this claim or raised serious questions as to its  
25 merits.

## 26 **5. An injunction against future executive orders is not appropriate.**

27 Lastly, in addition to the aforementioned disparities in Plaintiff’s claims, Plaintiff’s  
28 request for a preliminary injunction enjoining Governor Ducey from issuing any

subsequent Executive Orders imposing a “quarantine” is outside the scope of appropriate injunctive relief. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (“Injunctive relief . . . must be tailored to remedy the specific harm alleged. An overbroad injunction is an abuse of discretion.”) (quoting *Lamb-Weston Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)); see also *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987) (“Broad language in an injunction that essentially requires a party to obey the law in the future is not encouraged and may be struck from an order for injunctive relief . . .”).

### CONCLUSION

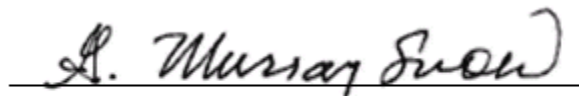
Because Plaintiff has failed to establish that he is likely to succeed on any of his claims, or even raise serious questions going to the merits of his claims, the Court need not consider the existence of an irreparable injury. *Germon v. Times Mirror Co.*, 520 F.2d 786, 788 (9th Cir. 1975). Plaintiff has failed to establish that he is entitled to a preliminary injunction enjoining the enforcement of EO 2020-33 or enjoining the issuance of any similar order in the future, and his Amended Motion is denied.

**IT IS HEREBY ORDERED** that Plaintiff Joseph McGhee’s Amended Emergency Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 22) is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff’s Motion for Leave to File Excess Pages for Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 23) is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff’s Motion for Leave to File Excess Pages for Memorandum of Law in Support of Third Amended Complaint (Doc. 24) is **GRANTED**.

Dated this 8th day of May, 2020.

  
G. Murray Snow  
Chief United States District Judge